SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 830

CONSTANTINO VINCENT RICCARDI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FREDERIC M. P. PEARSE,
Counsel for Petitioner.

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CONSTANTINO VINCENT RICCARDI,
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THE UNITED STATES OF AMERICA,
Respondent, Appellee Below

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

I

Summary Statement of the Matter Involved

1. The petitioner, Constantino Vincent Riccardi, was indicted in the United States District Court for the District of New Jersey in an indictment containing four counts, charging that the defendant in each count violated Title 18 U. S. C., Section 415, in that he by fraud, acquired certain

goods and chattels and transported or caused them to be transported in interstate commerce.

The District Court ruled that counts 1 and 3 of the indictment had not been proven because the goods and chattels enumerated therein were not of the value of $5,000 or more, and granted an acquittal on these two counts. Counts 2 and 4 went to the jury.

2. The case was tried in the District Court of the United States for the District of New Jersey, resulting in a verdict of guilty and the District Court sentenced the defendant to serve a term of ten years on each count, to run concurrently, and also imposed a fine of $10,000. The trial was started on June 3, 1948 before the Hon. Guy L. Fake and consumed approximately ten days.

3. An appeal from the judgment was taken to the United States Court of Appeals for the Third Circuit and the judgment of the District Court was affirmed on April 29, 1949.

II

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 347 (a); Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; and Rule 37 (b) of the Federal Rules of Criminal Procedure.

Judgment of affirmance by the United States Court of Appeals for the Third Circuit was entered on April 29, 1949.

III

Question Presented

May lists taken from a copy of an indictment be used by a witness to refresh the recollection of such witness.

IV

Statement of the Case

Although the record of this case is quite voluminous, the question presented is confined to the testimony of one Princess Doris Farid es Sultaneh who, the indictment alleges, was defrauded by the acts of the defendant.

The Princess met the defendant in July of 1945 and became well acquainted with him shortly thereafter (31a). There were tentative arrangements between the Princess and the defendant which would lead to matrimony upon his obtaining a divorce (88a). In August of 1945 the Princess went to Phoenix, Arizona and as a result of inspecting a ranch which the defendant owned near Phoenix it was agreed that she would give him certain furniture to place in the ranch house so that it would be suitable for her when she lived there after she and the defendant were married.

As a result of many conversations between them, on or about the 25th day of September, household articles were placed upon a truck which she owned, at Morristown, New Jersey, and the truck was driven to Phoenix by an employee of the defendant. The defendant's station wagon was used for three other shipments from Morristown to Phoenix.

The first count in the indictment (4a) alleged that the goods transported were of the value of $4,360. The second count alleged goods in the amount of $5,575. The third count alleged goods in the amount of $876 and the fourth count alleged goods of the value of $5,976.

At the end of the government's case a motion was made for a judgment of acquittal with respect to counts one and three of the indictment on the ground that the values alleged in those counts were less than $5,000 as required by the statute, 18 U. S. C., Section 415. The Government consented

to the trial court dismissing the counts, and the case proceeded on counts two and four.

The question of what articles were in each shipment was very important because the amount alleged in count two was only $575 over the statutory amount and in count four only $976 over the statutory amount.

The Princess was one of the persons to testify for the government as to what went west in the truck and station wagon. In her examination (112a), the United States Attorney attempted to have her refresh her recollection as to the items in each shipment from certain typewritten lists which she testified she had typed from scribbled notes that she had made. The actual time when the typewritten lists were made up was never definitely set in her testimony. The use of these typewritten notes to refresh recollection was objected to by counsel for the defendant and the witness was directed to produce the memoranda in her own handwriting that she had made. She did not do so. However, the government had in its possession and produced Exhibit D-7 (806a), which bears the date of December 12, 1945. It itemizes many items mentioned in various counts of the indictment.

The typewritten notes having been objected to, the United States Attorney abandoned their use and he subsequently (136a) presented to the witness (the Princess) a list of articles cut from copies of counts 2 and 4 of the indictment leaving out the dates and valuations. An actual copy of the indictment was used and the dates and amounts were covered over or stricken out.

Using these lists to refresh her recollection the witness read off the articles that were in each shipment as alleged in counts 2 and 4 of the indictment, without any proof of the dates of the shipments. An examination of her testimony (140a and 141a) will give an example of the way she

testified. This procedure was objected to by counsel for the defense (139a) as being an improper way for the witness to refresh her recollection.

V

Statutes Involved

As the construction of the statutes of the United States is not involved in this application for a writ of certiorari, we deem it unnecessary to set forth the statute involved in full, although the indictment is based upon Title 18 U. S. C., Section 415.

VI

Reasons for the Allowance of Writ

The decision of the United States Court of Appeals for the Third Circuit conflicts with the decisions of this Court and other Courts of Appeal in the cases of *Putnam* v. *United States,* 162 U. S. 687; *Delaney* v. *United States,* 77 F. (2d) 916; *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 84 L. Ed. 1129, and other representative cases and authorities cited in the brief which follows.

WHEREFORE your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and all of the proceedings of the said Court of Appeals in the said case entitled in that Court: *United States of America* v. *Constantino Vincent Riccardi* No. 9745, October Term, 1947, to the end that this case may be reviewed and determined by this Court as provided for by the

statutes of the United States and that the judgment herein of the Court of Appeals for the Third Circuit be reversed by this Honorable Court and for such other further relief as to this Court may seem proper.

CONSTANTINO VINCENT RICCARDI,
By FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 830

CONSTANTINO VINCENT RICCARDI,
Petitioner, Appellant Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent, Appellee Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Third Circuit appears following the proceedings in the said Court of Appeals at the end of the Appendix submitted herewith.

II

Statement of the Case

A full statement of the case is included in the preceding petition under Point IV.

III

ARGUMENT

The Trial Court Erred in Allowing Lists Taken from a Copy of An Indictment to Be Used by a Witness to Refresh the Recollection of Such Witness.

The defendant is charged in an indictment containing four counts that he acquired by fraud certain goods and chattels enumerated in each count of the indictment from the Princess Doris Farid and transported them or caused them to be transported in interstate commerce. As the allegations in the first count of the indictment contained a list of goods under the value of $5,000, the Court dismissed this count of the indictment and also dismissed for the same reason the third count of the indictment, thus leaving two counts to be submitted to the jury, viz. Counts II and IV. Count II alleged that the total value of the items was $5,575 and Count IV alleged that the total value of the items was $5,976. Count II contains a list of 30 items and Count IV contains a list of 45 items, the value of each individual item being placed opposite thereto. Therefore, in view of the fact that in each of these two counts the values alleged were only slightly above the jurisdictional sum of $5,000, proof of the presence of most of these items upon the vehicles used for transportation became a matter of the greatest importance as may readily be seen.

The Princess Doris Farid was the first witness called by the prosecution to prove these various items. It also appears from the proof that the items referred to in Count II were transported on a one ton truck belonging to the Princess and that the items contained in Count IV were transported in a station wagon belonging to the defendant.

The witnesses in the court below seemed to agree that the truck made the first trip and the station wagon made the

last trip. The Princess testified generally that the truck contained "the heavier pieces that the station wagon could not carry" (108a). After this statement the Court asked the witness "Did you make a list, Madam?" and she answered "I did. As each item was taken from the house, I made a notation, scribbled it, rather; I didn't—I afterwards typewrote it but I made a notation as each thing was taken from the house."

After some further examination on this subject by the Court the witness was then shown a paper by the prosecutor and she stated "This is my typewritten copy from my scribbled notes that I took, which I copied off afterwards," and that it was a list of articles of furniture, silverware, etc. that were sent from Morristown to Phoenix, Arizona (109a).

The Court then interrupted the examination "Now, if you have that data, an invoice for each of the separate dates, produce it and go forward and save some time" (110a).

Thereupon the witness was shown certain typewritten papers upon which counsel for the defendant sought leave to cross examine before she used them and protested against their use by the witness as a means for refreshing her recollection (110a-125a). Thereafter the Court inquired of the Princess whether or not, when she made a list of the articles that were shipped, it was in longhand. She said it was, and when the Court inquired as to where her notes were she stated she believed that they were in possession of a member of the F. B. I., and that it was from those notes that she had made the typewritten copies which the prosecutor was attempting to use for the purpose of refreshing her recollection (110a). After further colloquy between the Court and counsel with respect to these typewritten lists the Court stated in effect that if the witness did have the original memoranda that that would be better to refresh her recollection than the documents made afterwards, and that if she

did not "then you come to the question whether she can use this paper which is presented here this morning. The rule is, as I understand it, that the witness can be shown anything and if she testifies that that refreshes her recollection she can testify from her recollection. It is not to be assumed that a witness can remember the numerous items mentioned in these several counts. One may look at a list and refresh her recollection by some means or other by being shown a document and it would be permissible. Proceed" (114a). There was more argument and discussion with the result that no original memoranda except D-7 was produced and the prosecutor abandoned the idea of using the typewritten sheets to refresh the memory of the witness (121a, 125a).

However, when the Princess resumed the stand the following day, the prosecutor handed the Princess a copy of the list enumerated in Count II of the indictment and a copy of the list referred to in Count IV of the indictment, cut from a copy of the indictment, to refresh her recollection (137a). Again counsel for the defendant objected to the use of any such lists to refresh the memory of the witness (139a). Thereupon the Court questioned the witness and asked her whether or not when she looked at these particular papers they refreshed her recollection and she said that they did and thereupon the Court permitted her to read off the lists contained in each of these papers to the jury, as proof of the actual articles that were loaded on the truck when it left for the west, and the actual articles loaded on the station wagon when it left for the west in December (149a). Of course all of this was done and permitted after appropriate objections.

The leading case on the kind of memoranda that may be used by a witness to refresh recollection appears to be the case of *Putnam* v. *United States*, 162 U. S. 687, 40 L. Ed. 1118. In the *Putnam* case the defendant had been convicted

of a violation of the then National Banking Act and had taken an appeal to the Supreme Court of the United States. One of the errors assigned was the use of improper memoranda to refresh recollection. A witness for the government, a bank examiner, was being questioned as to what the defendant had done with certain bonds and the witness replied that he did not recollect. Thereupon the prosecutor stated that he was taken by surprise at the answer, and pointed out that he had the testimony of the witness, taken before the grand jury and that he wished to ask him if he did not testify to certain things before the grand jury. Over objection, the Court held that it was a matter of discretion and so the Court permitted the prosecutor to call the attention of the witness to certain answers that he gave to questions propounded to him before the grand jury, and the Court over objection permitted the questioning to continue, stating that it was a thing that was often done when counsel say that they are surprised and that it was within the discretion of the Court to allow counsel to direct the attention of the witness to something which may refresh his recollection, adding, however, that it must be understood that what was done was merely for the purpose of directing the witness' attention to the matter and that it is not in evidence unless the witness remembers the conversation and states it while on the witness stand.

In considering the alleged error the Supreme Court had this to say:

> "It is also clear that where a memorandum or writing is presented to a witness for the purpose of refreshing his memory, it must either have been made by witness or under his direction, or he must be connected with it in such a way to make it competent for the purpose for which it is proposed to use it. But here the objection below did not address itself to the fact that the minutes of the testimony taken before the grand jury had not

been properly authenticated or that they had not been reduced to writing in the presence of the witness or read over or examined by him at the time. The exception taken, therefore, reserves none of these questions. We shall hence, in considering the matter, assume that in these particulars the use of the testimony taken before the grand jury to refresh memory was not objectionable.

* * * * * * *

"The very essence, however, of the right to thus refresh the memory of the witness is that the matter used for that purpose be contemporaneous with the occurrences as to which the witness is called upon to testify. Indeed, the rule which allows a witness to refresh his memory by writings or memoranda is founded solely on the reason that the law presupposes that the matters, used for the purpose, were reduced to writing so shortly after the occurrence, when the facts were fresh in the mind of the witness, that he can with safety be allowed to recur to them in order to remove any weakening of memory on his part, which may have supervened from lapse of time. * * *

"Memoranda are not competent evidence by reason of having been made in the regular course of business, unless contemporaneous with the transaction to which they relate. *Nicholls v. Webb,* 21 U. S. 8 Wheat. 326, 337 (5: 628, 630); *Aetna Ins. Co. v. Weide,* U. S. 9 Wall, 677 (19: 810), and *Republic F. Ins. Co. v. Weide,* 81 U. S. 14 Wall, 375 (20: 894); *Chaffee v. United States,* 85 U. S. 18 Wall, 516 (21: 908). It is well settled that memoranda are inadmissible to refresh the memory of a witness unless reduced to writing at or shortly after the time of the transaction, and while it must have been fresh in his memory. The memorandum must have been 'presently committed to writing.' Lord Holt in *Sandwell v. Sandwell,* Comb. 445; Holt 295; 'while the occurrences mentioned in it were recent and fresh in his recollection,' Lord Ellenborough in *Burrough v. Martin,* 2 Campb. 112: 'written contemporaneously with

the transaction,' Chief Justice Tindal in *Steinkeller v. Newton,* 9 Car. & P. 313 or 'contemporaneously or nearly so with the facts deposed to,' Chief Justice Wilde (afterwards Lord Chancellor Truro) in Whitfield *v.* Aland, 2 Car. & K. 1015. See also Burton *v.* Plummer, 2 Ad. & El. 341, 4 Nev. & M. 315; *Wood v. Cooper,* 1 Car. & K. 645; *Morrison v. Chapin,* 97 Mass. 72, 77; *Spring Garden Mut. Inc. Co. v. Evans,* 15 Md. 54, 74 Am. Dec. 555.

"In appreciating what length of time after the occurrence may be considered as 'contemporaneous,' as 'shortly after the time of the transaction,' or 'while fresh in his recollection,' courts have differed somewhat, depending of course upon the facts of each particular case."

The testimony before the grand jury was in August, 1893, and the trial took place in December, 1893, a period of four months. The Court reversed the judgment on the count which involved this objectionable testimony.

The rule laid down in the *Putnam* case came up for consideration in the case of *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 84 L. Ed. 1129. Here again the use of grand jury testimony for the refreshing of the memory of a witness was up for review, and the Court said (at page 235):

"In addition, it clearly appears that the use of this material was not prejudicial. So far as the subject matter of the inquiry is concerned, that prior testimony was either cumulative or dealt only with the minutiae of the conspiracy. The record minus that testimony clearly establishes all the facts necessary for proof of the illegal conspiracy. No portion of it was dependent on the minor facts concerning which the memory of these witnesses was refreshed. Hence, the situation is vastly different from those cases where essential ingredients of the crime were dependent on testimony elicited in that manner or where the evidence of guilt

> hung in delicate balance if that testimony was deleted. See Little *v.* United States (C. C. A. 8th) 93 F. (2d) 401; Putnam *v.* United States, 162 U. S. 687, 40 L. Ed. 1118, 16 S. Ct. 923. Hence assuming, arguendo, that there was error in the use of the prior testimony, to order a new trial would be to violate the standards of sec. 269 of the Judicial Code (28 U. S. C. A. sec. 391), since the 'substantial rights' of respondents were not affected. There are no vested individual rights in the ordinary rules of evidence; their observance should not be reduced to an idle ceremony."

The Court went on to say that whatever may be said of the *Putnam* case on the merits it did not establish an inflexible four months' period of limitation, adding that "there the event was a single isolated conversation, most damaging to the defendant" (page 236).

The Court further stated: "Measured by the test of whether or not the prior statement made under oath was reasonably calculated to revive the witness' present recollection within the rule of the *Putnam* case, there certainly cannot be said to have been error as a matter of law. * * * And in view of the obvious hostility and evasiveness of most of these witnesses, we cannot say that the judge transcended the bounds of discretion in permitting their memories to be refreshed in this manner."

It will be seen from a reading of the above case that the Supreme Court in no way overruled its previous decision in the *Putnam* case but merely distinguished it in the *Socony* case. The situation in the *Socony* case was vastly different from those cases where essential ingredients of the crime were dependent on testimony elicited in that manner or where the evidence of guilt hung in delicate balance if that testimony was deleted.

The Third Circuit has also passed on this question and we call the attention of the Court to the case of *Delaney v.*

United States, 77 F. (2d) 916. This was a criminal case where a person was charged with violating the income tax law. In this case the witness for the government testified that he had made payments to the defendant, but that he could not recall the amount. Over objection by the defendant the witness was allowed to use photostatic copies of records which had not been made by him or under his direction. The Court said that it was apparent that what the witness did was to testify directly from the photostatic copies of records made by another, and not from his recollection, refreshed by the memoranda, and reversed the judgment of the court below because of this error.

Of course there are many methods which may be used to quicken the memory of particular dates, names and faces, etc. and the memory may be quickened by almost any means necessary for the purpose, such as a song, a face, a newspaper item or a writing of some character. One judge has given an illustration of tying a knot in a handkerchief.

But that is not the situation here. In the instant case the recollection of the Princess as to the dates when the truck and the station wagon left Morristown was wholly unreliable. Her recollection of the articles loaded on the truck and loaded on the station wagon was also very indefinite, and it is perfectly obvious that without the use of the lists cut from a copy of the indictment she never would have been able to state with any degree of certainty what the articles were that were loaded on the truck and on the station wagon.

The Princess did not come within the category of an obstinate, recalcitrant and unwilling witness, or even a forgetful witness who was trying to tell the truth, as the witnesses in the *Socony* case.

The situation in the instant case was more like that in *Jewett* v. *United States*, 15 F. (2d) 955. This was a

criminal case in which the defendants were charged with conspiring to violate various provisions of the National Prohibition Act. In that case witnesses were called by the government to prove the essential facts in the case. After having had a transaction with one or more of the defendants these witnesses had made memoranda thereof in notebooks, etc. Immediately prior to being called as witnesses they resorted to these records and made notes therefrom and brought such notes to the witness stand. Learning that the notes were so made, objections were made to their use and the production of the original notes in court was demanded. These objections were overruled and the witnesses were permitted to use the notes which they had produced in court. It appeared that they were unable to testify without having in their hands the copy of data to which they could refer for facts which they could not remember; and had no independent recollection thereof, and the Court held that the use of such memoranda in this manner was improper and the judgment was reversed.

Attention is again called to the *Socony* case where, as we have before stated, counsel was permitted to refresh the recollection of witnesses as to certain matters by reference to a previous examination before the grand jury. Such use *was not for the purpose of proving the essential ingredients of the crime* but only to refresh the recollection of the witnesses with reference to certain particulars not affecting the substantial rights of the defendants.

Nor are we confronted with the rule with respect to the propriety of examining counsel, to refresh the recollection of a recalcitrant witness, to refer to previous contradictory statements made by the witness, such as the situation which arose in *Hoffman* v. *United States*, 87 F. (2d) 410, and in many other similar cases.

Nor are we confronted with the situation pictured in *Dowling Bros. Distilling Company* v. *United States*, 153 F. (2d) 353, where a witness for the government had testified to certain essential facts without extrinsic aid, and was permitted to refer to a non-contemporaneous memorandum merely to refresh his recollection as to details of prices.

Of course the trial court has some discretion in matters of this kind but such discretion may be abused and was abused by the trial court in this case, in permitting the Princess not only to testify from but to actually use the lists hereinbefore referred to and read therefrom and say that all of the articles read off were actually loaded on the truck or the station wagon (139a-151a).

This matter becomes of the highest importance in this case because of the fact that the total enumerated items in Count II were alleged to have been only of the value of $5,575 and the total value of the items in Count IV were alleged to be of the value of only $5,976.

Another reason is this, neither the Princess nor Murane, nor Rizzo had anything but general recollection of what was actually loaded on the two vehicles. The only original memoranda produced was Exhibit D-7, a memoranda in the handwriting of the Princess made some time after December 4th, 1945 and after the station wagon had left on its last trip.

The lists themselves could never get into evidence under any theory or principle of law. Yet in effect that is exactly what happened. The lists were cut from a copy of the indictment, as we have already said. The jury knew this. The Princess took them in her hand and read off the articles to the jury one by one from each list. The jury subsequently retired, took the indictment into the jury room, therefore having the benefit of the very paper itself from which the

Princess had read, just as though it had been admitted in evidence. This should not have been permitted.

We urge that the Court of Appeals erred in sustaining the ruling of the trial judge permitting the use of such papers to refresh the recollection of the witness.

Conclusion

Your petitioner respectfully submits that the Court of Appeals for the Third Circuit has failed to follow the applicable decisions of this Court, and that a conflict exists between its decision and the decisions of other Circuit Courts of Appeal and of this Honorable Court, and that the questions presented by the foregoing petition should be reviewed by this Honorable Court.

Respectfully submitted,

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioner.